

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

original

77-6109

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO and
ADA M. CATALDO,

Appellants,

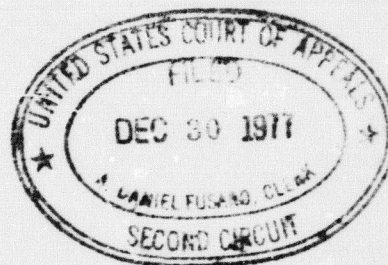
-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT LEVINE,

Respondents.

----- -x

12/30 P/S
77-6109



REPLY BRIEF

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REPLY BRIEF

INDEX NO. 77-6109

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QUESTIONS INVOLVED

1. Have appellees supported the decision appealed from in view of the claims of appellants to the Court's failure to show the similarity between the cause of action previously decided and the cause of action now before the Court, or, that the issues in this case were previously decided on the merits by a final decision, and that such decision was necessary to the judgment in the prior suit? Instead, they resort to making the claim of similarity without a showing of that similarity. Yet, it is appellees' burden to prove the application of their claim that res judicata or collateral estoppel bars the complaint in the case at bar.

2. Have appellees met the Second Point of appellants' brief, that the denial of appellants' motion to disqualify the United States Attorney as the attorney for defendants was erroneous? Appellees have not uttered a word in defense thereof.

3. Are appellees entitled to urge this Honorable Court to affirm on the alternative grounds they mentioned in their POINT II? Without a notice of appeal from appellees, their demand for affirmative relief is outside the jurisdiction of this Court.

POINT I

NEITHER RES JUDICATA NOR COLLATERAL
ESTOPPEL HAS BEEN SHOWN TO APPLY TO
THIS ACTION

Appellees contend that decision in the tax refund suit are res judicata or bar this suit by collateral estoppel. Yet, they fail to point to any final judgment on the merits of the facts pleaded in this case which judgment was necessary to decide the issues in the tax refund suit.

The complaint is to be found at p. 6, et seq., of the APPENDIX. The complaint in the tax refund suit and the conclusions of law after trial of that suit are found at pp. 30, et seq., of the Appendix. A comparison will immediately show that the causes of action are different. Hence, the judgment entered in the tax refund suit is not res judicata of this suit.

Neither the Court below, nor the appellees have argued the sameness or dissimilarity of the issues raised in the two suits. Yet, the similarity of the issues will have to be proven before a court may say that an earlier decision is "res judicata" of a later suit. See plaintiff's main brief,

pp. 20-20a, for federal court cases, and p. 22, for cases on the same subject by New York courts.

Both the Court below and the appellees say that this action is the same as the tax refund cause of action, because plaintiff seeks to recover here what was lost in the tax refund suit. In the First place such an analysis is not true in fact. It appears to be argumentative and very probably it is a major premise of the syllogism to apply collateral estoppel. But, as that major premise is untrue, the conclusion is likewise untrue.

The damages in this action are much greater than what was in issue in the tax refund suit. The principles involved in a tax refund suit are totally different from the principles involved in this fraud action. The question in the refund suit, as limited by Judge Levet, was the claimed expenses deductible as business expenses. The issue in this suit is, was Judge Levet's action in dismissing the tax refund suit affected by the deceitful actions of the parties defendant. What is more, the issue in this case is aggravated by the consideration of whether the action of the defendants, either alone or in common with each other, or aided and abetted by the activity of Mr. Madden, was a fraud upon the Court. It is not enough to say that the two actions have the same purpose because the complaint alleges that the District Court would not have found against plaintiffs, but for the wrongdoing of the appellees. Such a statement, in fact, makes the complaints different from each other. It's not the facts but the wrong which is the cause of action, Balti., etc. v. Carroll, 280 U.S. 491.

Hence, the established rule of res judicata that the second cause of action shall be the same as the first, in which there was a final judgment on the merits means exactly that the two cases must be the same. In this suit, the defense does not apply because the two cases are dissimilar.

Further, plaintiff has shown that where a litigant attacks a judgment of this Court as having been the result of fraud or deceit upon the Court, the res judicata doctrine does not apply because the Court's own action is involved, as its integrity is at stake. Judge Brown, in Kinnear Weed Corp. v. Humble Oil, 403 F.(2) 437 5th Cir., 1968), said at pp. 439-440:

"But, as we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata, collateral estoppel, or doctrines akin to them, we reject them here. They are not a bar or defense here or below."

Appellees have failed to understand the principles stated by Judge Brown.

Finally, appellees have arrived at their conclusion of sameness between the two suits by a declaration that the fraud practiced in the tax refund suit was of the intrinsic kind. They say that intrinsic fraud does not support a claim of fraud on the court. The dichotomy between extrinsic and intrinsic fraud is no longer recognized either in the federal courts or in the New York Courts. Rule 60(b), subd. 3, F.R.C.P., states several new procedures to supplant the old equity attacks

upon judgments. Fraud is not one of them, see 7 Moore's, Federal Practice, 2nd Ed., par. 60.01 [1][2], p. 60.33, and par. 24[5] and Oliver v. City of Chattuck, etc., 157 F.(2) 150.

The change in New York occurred with the advent of the C.P.L.R., see Levine v. O'Malley, 33 A.D.(2) 874, 307 N.Y.S.(2) 918 and 5 Weinstein-Korn-Miller, New York Practice, par. 5015.09.

As for collateral estoppel, both the Court below and the appellees have applied it because they claim that the issues here were before the District Court and on the appeal to this Honorable Court. How the summary dispositions of objections during the trial could be translated as issues raised and tried therein, and thus binding upon the issues in this litigation, is not explained. The obvious fact is that there was no trial of the issues raised by the deceitful practices charged to these defendants. Nor was there a trial of those issues in this Court. Nor can it be said that the motions made to Judge Levet for permission to offer proof before the close of the trial of the facts mentioned in the moving papers, that his decision denying the motion was a final decision on the merits of the facts of the fraud raised in this suit. Such a claim can only be said to be preposterous. All that happened was that the Court denied the motions because it said that the decisions about their admissibility were made during the trial. That was no final decision on the merits of whether or not the actions of Land, Reilly, Levine or Madden happened

as appellants claim. These happenings are described in the complaint and in the affidavit on this motion in the Court below. Nor that such a decision, if it had been made, would be necessary to the decision in the tax refund suit. No attempt is made by appellees, which is their burden to carry, of showing a trial of the actions complained of in this suit. Nor a decision on the merits, and its necessity to the decision in the first action. Accordingly, appellees fail to show the applicability of the defense to this action. Both Kinnear Weed and Griffith v. Bank of N.Y., 147 F.(2) 899, like Bannon v. Bannon, 270 N.Y. 484, say that res judicata or collateral estoppel is not applicable, as a general rule, by decision on motions.

Appellees have made loud claims about the rule that in a tax refund suit the burden of proof is on the tax-payer. Hence, they say that Land and Reilly did not advance any unsound legal arguments. But what plaintiffs have always complained about is that Land and Reilly did advance unsound legal arguments. Example: plaintiff has complained about the fact that Land and Reilly told the Court that they could make disallowances not made by the Commissioner. The rule is that only the Commissioner may make disallowances, and attorneys do not have the power to audit returns. The deficiency is a finding which establishes the Government's claim to tax. When that deficiency is shown to be wrong, its presumption of correctness is lost to

the Government. The taxpayer is then permitted to show that his return was made properly. The Government would have the burden of showing error. See C.I.R. v. Pacific Mills, 207 F.(2) 177, at 183, 184; and Kronheim v. United States, 163 F. Supp. 620, where Judge Laramore quoted from the Pacific Mills case to state the same principle, at pp. 628, 629. See also Ragsdale v. Paschel, 118 F. Supp. 280, a decision clearly applying the rule. See also the cases at the bottom of p. 14 of the main brief. Plaintiff was refused permission to offer proof of an arbitrary assessment and proof of how he normally conducted his business and of how he reported his income tax by the claims of the appellees. Certainly, this was prejudicial to the plaintiffs' case caused by picking Judge Levet into limiting the trial to the list of items in the defendants' trial memorandum. This deprived plaintiffs of the proof in Levine's deposition that the Commissioner had arbitrary disallowances in the deficiency. Plaintiffs were deprived of the right to trial upon established issues settled by the deficiency and their complaint.

In any event, the ruling of the Court below that res judicata and collateral estoppel are patently erroneous and the order should be reversed.

POINT TWO

MAY APPELLEES HAVE AFFIRMATIVE RELIEF?

Appellees have not filed a notice of appeal from the decision below, yet, they seek affirmative relief from this Court because Judge Mishler did not pass upon their claim that immunity accords defendants protection from this suit by reason of their official position in the Federal Government. This Court is a court of limited jurisdiction, see 28 U.S.C.A. 1291 and 1292. To invoke its judicial powers, a notice of appeal must be filed by a party aggrieved, if a civil suit, see Rule 3, Federal Rules of Appellate Practice; and, within the time prescribed in Rule 4 of the same rules. No notice of appeal has ever been filed and it would be too late to file one now. Hence, this Court does not have jurisdiction over appellee's request for relief, see Dickenson v. Petroleum Conversion Corp., 338 U.S. 491. Appellees' case, Lum Wan v. Espardy, is not an authority for what appellees propose. Without a record showing that the facts clearly dictate a decision in their favor, they want this Court to take cognizance of their claim. Justices does not clearly require this Court to do that. Rather, appellees again forget their burden of proof of new matter. They fail to show that there was no criminal conduct nor that such conduct did not violate Constitutional due process rights of the plaintiffs. Instead, their claim is merely an argument that immunity applies. The argument is unsound as they fail

to acknowledge the predicate of their argument, namely, that their action was within the scope of their duties. To be within the scope of their duties, their action would have to be non criminal and not violative of due process.

Hence, the defense of the several types of immunity are not applicable. It would be in the interest of justice to leave them where the Court below left them, undecided. Immunity is not granted an official, no matter how high his office, if the action complained of is criminal in nature. Obstruction of justice, perjury, subornation of perjury, and deceit upon the court by advancing untrue facts and inapplicable law are acts proscribed for the penal statutes of Congress and the State of New York. They are nothing to scoff at. Besides, such criminal conduct deprives a litigant of his Constitutional right of due process and of the equal protections of the law. Violations of Constitutional rights are actionable, see Bell v. Hood and the arguments in the main brief, at pp. 19-20. Appellees seem to disagree with the appellant's purpose in using the citations to Lyons, Arnous, Savvides and Schwartzman, also found at p. 20 of the main brief, but they misread appellee's purpose in citing those cases. That purpose is simply that the action of a public attorney in knowingly offering testimony that is not true, deprives the adversary of his Constitutional right to due process. Is this action to recover for that deprivation maintainable? This question is

not answered by appellees. Yet, the Supreme Court has held that violations of Constitutional rights may be redressed just like any other damage claim.

Being blinded by their failure to see this point, Appellees continue to claim immunity like it was the very duty of public prosecutors to defend miscreants within their own ranks. Who gave them the power to do that, and what statute passed by Congress or Constitutional provisions grants the United States Attorney the right to protect appellees against prosecutions for their criminal acts, they do not say. They rely on cases which extend immunity where the affiants have acted within the scope of their duties. Appellees rely heavily on Imbler v. Pachtman, but that case is a civil rights action, an action granted by an act of Congress. It is not a right of action to recover for violations of Constitutional rights. Even so, in Imbler, at p. 429, the Court said that no immunity exists if the prosecuting attorney resorted to criminal conduct to gain a verdict. The Court cited the Code of Professional Ethics, which prohibits such trial tactics. No one but no one may violate a Constitutional right. See United States v. Nixon, 418 U.S. 683, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, Marbury v. Madison, 1 Cranch 137, and Gravel v. U.S., 408 U.S. 606, 627. At page 627, the Supreme Court said in Gravel:

"But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry * * * * The so-called executive privilege has never been applied to shield executive officers from prosecution for crime * * * *"

Also, the cases of Lewis v. Brautigam, 227 F.(2) 124, 128 and Hilliard v. Williams, 465 F.(2) 1212 are cases where public attorneys were held not to be immune from suit for damages, when in the prosecution of their duties, they violated the criminal laws.

With the elimination of the differences between intrinsic and extrinsic fraud, if the fraud consists of acts which are proscribed by the penal statutes, the courts are now free to exercise their inherent power to correct judgments which have been obtained by that criminal conduct. There can no longer be a refusal by a court to set aside a judgment where there is a clear violation of the obstruction of justice statute. Reading the old cases which applied the old rule, one is struck by the lack of logic that a court felt constrained not to correct a judgment even though that judgment resulted from deceit practiced upon the court. A fraud is a fraud, and injury flows from it which is frustrative of the effort of the courts at bringing rationality into the affairs of the people seeking its help.

POINT III

APPELLEES' FACT STATEMENTS ARE
NOT SUPPORTED BY THE RECORD.

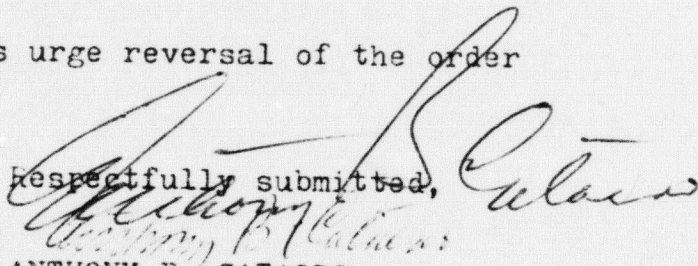
Appellees fail to recognize that in the affidavit on the motion there is set forth the activities of Mr. Madden, Judge Levet's secretary, within the tax refund suit. These are evidentiary facts to support appellant's claims to fraud upon the Court. In a motion for summary judgment, the plaintiff, as well as the moving defendant, is entitled to support his complaint with an evidentiary showing of a valid cause of action. As appellees fail to take these facts about Mr. Madden's activities into account, their argument is unsound.

Then appellees discuss, but without pointing to proof in the record for their claim that there was no perjury, subornation of perjury, no making of claims to law which did not exist or to untrue facts. They simply make a broad claim that their actions could not be interpreted as criminal. It is their burden to meet the charges made about them by proof, not by relying on a general claim or conclusion. The Internal Revenue Commissioner had approved none of the items listed in the memorandum of the Government in the tax refund suit, and the trial should not have proceeded on those items. This Court is respectfully cautioned not to accept appellee's fact claims at face value, but to look for the proof of them in the record; especially where appellant's fact statements are contrarwise.

About the unlawful activity relating to defendants' refusal to produce records despite the subpoena, see pp. of the record 92, 118, 289, 291 and 293. About the claims to law that did not exist, see pp. of the record 117, 181, 183, 190, 300, 333 and 384. Actually, testimony may be needed to explain them, but they ought to be obvious to this Court.

One further thought: appellees have filed a formidable Appendix consisting of the trial minutes and one affidavit, and other papers filed within the tax refund, but not the whole record. The whole record only could faithfully reproduce the proceedings in that case. That would require a trial of the action. However, appellees have not had occasion to refer to their appendix for proof of their claims. Why then was the reproduction of so much paper necessary when the originals are available? It is respectfully submitted that, if this Court affirms, it ought not to award costs, at least, it ought not to allow the printing costs of such useless material.

WHEREFORE, appellants urge reversal of the order appealed from.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Appellant

STATE OF NEW YORK)

:

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COUNTY OF NEW YORK)

Ada W. Cataldo

being duly sworn, deposes and says:
deponent is not a party to the action,

is over 13 years of age

and resides at *Queens New York*

On *December 30, 1977* deponent served ^{*three copies of the*} ~~the~~ *within brief*
upon *Hon. Dan W. Trager*

attorney (s) for *respondents* in this action, at *225 Cadman Place*
Brooklyn New York

the address designated
by said attorney(s) for that purpose by depositing a true copy of
same enclosed in a post-paid properly addressed wrapper, in--a
post office--official depository under the exclusive care and
custody of the United States Postal Service with the State of
New York.

Sworn to before me on

30th day of December 1977.

Ada W. Cataldo

Anthony B. Cataldo

ANTHONY B. CATALDO
Notary Public, State of New York
No. 41-5650500 Qualified in Queens County
Certificate filed with New York Co. Clk's Office
Commission Expires March 30, 1978